Miller Brewing Company *and* Teamsters for a Democratic Union. Case 11–CA–14942

August 26, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On January 26, 1993, Administrative Law Judge Richard J. Linton issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed cross-exceptions, a brief in opposition to exceptions, and a brief in support of its cross-exceptions.

The National Labor Relations Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We adopt the judge's conclusion that the Respondent did not disparately enforce its plant rule pertaining to employee postings. As the judge found, the record shows that the Respondent did not knowingly permit employees to post personal items. In these circumstances, the Respondent's policy mandating removal of *all* employee postings, including material pertaining to Teamsters for a Democratic Union (TDU), pursuant to its established plant rule, did not violate Sec. 8(a)(1). In adopting the judge's dismissal of the complaint, however, we find it unnecessary to rely, as did the judge, on the Respondent's absence of specific animus toward TDU. If, unlike here, an employer's enforcement of its posting rules is discriminatory the absence of independent evidence of animus is irrelevant. See *Lassen Community Hospital*, 278 NLRB 370, 372–373 (1986). Member Raudabaugh does not disavow the judge in this respect. The judge was speaking about an increase in enforcement, not a disparity in enforcement. If the increase in enforcement had been because of animus against TDU, that would be *a relevant factor* in finding a violation. Thus, the judge's finding that this is not so is a *relevant factor* in not finding a violation. Concededly, this factor is not a dispositive one, for the absence of motive does not necessarily mean that no violation will be found.

Joseph T. Welch, Esq., for the General Counsel.
John M. Capron, Esq. (Fisher & Phillips), of Atlanta, Georgia, for Respondent Miller Brewing Company.
Karen Anita Keys, Esq. (Brief only), of Washington, D.C., for Teamsters for a Democratic Union.

DECISION

STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge. This case involves an alleged disparate treatment of employee postings (on doors, walls, and other miscellaneous areas) of material supporting Teamsters for a Democratic Union (TDU). The evidence failing to show that the Company knowingly permitted postings in miscellaneous areas in violation of its plant rule against such, that it disparately removed some postings, or that it was unlawfully motivated against TDU postings, I dismiss the complaint. This case does not concern employee solicitations or distributions.

I presided at this 2-day trial, September 2–3, 1992, in Wentworth, North Carolina, pursuant to the May 21, 1992 complaint issued by the General Counsel of the National Labor Relations Board through the Regional Director for Region 11 of the Board. The complaint is based on a second amended charge filed May 15, 1992, by TDU and served on Miller Brewing Company (Miller, Respondent, Company, or MBC) on May 18, 1992.

Although the second amended charge obviously was preceded by other documents, as the complaint originally alleged, at trial I granted the General Counsel's unopposed motion to delete those allegations (1:6–8).[1] The Government's motion apparently was made to bypass the peculiar situation of the charging documents naming different persons as the charging party for the same case number. Accordingly, in the trial complaint (that is, the complaint as amended at the opening of the hearing) TDU is named as the only charging party.

In the Government's complaint the General Counsel alleges that Company violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), on March 20 and 26, 1992, by prohibiting employees from posting union-related material at locations in the plant that had previously served as posting areas. On March 20, it also is alleged, MBC removed all materials from such locations.

By its answer Miller admits certain factual matters but denies violating the Act.

On the entire record,[2] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel (whose brief includes a proposed order and notice), TDU, and Miller, I make the following

FINDINGS OF FACT

I. JURISDICTION

A Wisconsin corporation with a plant in Eden, North Carolina, Respondent Miller brews beer. Respecting commerce, the complaint alleges the Board's discretionary nonretail jurisdictional standard for direct inflow (purchases)

[1] References to the two-volume transcript of testimony are by volume and page. Exhibits are designated GCX for the General Counsel's and RX for Miller's.

[2] Apparently because the testimony of the second day covers 281 pages of transcript, the court reporting service split the volume, numbering the split parts as volume I and volume II. This confused the briefing for citations to the record. As the second day's testimony is less than 300 pages of transcript, I have reassembled it into a single book, volume 2.

and direct outflow (sales) during the past 12 months as goods, valued ''in excess of'' $50,000, ''received'' (par. 3) direct from points outside North Carolina, and (par. 4) ''shipped,'' without the accompanying ''purchased'' and ''sold'' as specified in the General Counsel's *NLRB Pleadings Manual* (1991) at 50 and 60.

Although the received/shipped terminology may be sufficient to establish jurisidiction, even, as here, in the absence of an allegation that the goods received and shipped to and from Miller's Eden brewery were used in Miller's business, the better practice is to use the language set forth in the Pleadings Manual. See *NLRB v. Drywall*, 974 F.2d 1000, 1002 (8th Cir. 1992); *Siemons Mailing Service*, 122 NLRB 81, 85 (1958).

The Board has exercised jurisdiction over Miller Brewing Company in reported cases, including *Teamsters Local 896 (Miller Brewing)*, 296 NLRB 1030 (1989), and *Miller Brewing Co.*, 254 NLRB 266, 270 (1981).

In light of the foregoing, and the record, I find, as Respondent admits, that Miller Brewing Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

1. MBC and Teamsters Local 391

Apparently headquartered in Wisconsin, Miller operates several breweries and container manufacturing plants around the country (2:262, 412). These facilities include a brewery at Eden, North Carolina (the plant involved here), and a container plant about 20 miles away at Reidsville (2:262). Miller employs about 700 production and maintenance employees at its Eden brewery, and about 225 such employees at the Reidsville container plant (2:263, 392).

Miller's production and maintenance employees throughout the United States are represented by various unions (2:413). The production and maintenance units at Eden and Reidsville are represented by Teamsters Local 391 (2:263, 413) under separate collective-bargaining agreements (CBA). The CBA (RX 1) covering the Eden bargaining unit has an effective term of September 30, 1990, through September 29, 1993 (RX 1 at 84). Teamsters Local 391 (Union) has represented the Eden unit since June 1978 (1:22; RX 1 at 1).

2. TDU and Edward Keith Howell

For many years employees supporting TDU (Teamsters for a Democratic Union) have been active for the organization. See, for example, *Roadway Express v. NLRB*, 831 F.2d 1285 (6th Cir. 1987). And TDU apparently was an intervenor in the Government's RICO lawsuit ''to rid the IBT of organized crime influence.'' *U.S. v. Teamsters*, 948 F.2d 98 (2d Cir. 1992). Only members of a Teamsters local may belong to TDU (1:60). Richard Gladden, human resources manager at Miller's Eden plant (2:172–173), describes TDU as a faction within the Teamsters. He testified that there is animosity between TDU and Local 391's leaders. (2:237–238). TDU member Garney Griffin describes it as ''dissatisfaction.'' (1:100). By corporate policy, Miller stays out of internal conflicts in the various unions it recognizes (2:414–416).

Edward Keith Howell operates a forklift at Miller, where he has worked since March 1978 (1:21). Although he has not been a member of the Union since 1981 (1:22), and therefore also not a member of the TDU (1:22, 60), Howell describes himself as an ''activist'' on behalf of the TDU (1:25, 60).

3. Bulletin boards and past practice

Miller's Eden plant, which opened in 1978 (2:185), covers 33 acres under roof (2:244, 255). At Eden MBC maintains official bulletin boards. They are glass enclosed and locked by key. Some of these boards are for company use, and others, pursuant to section 3.9 of the CBA (RX 1 at 7) with the Union, are designated for posting of contractually specified notices of the Union. Only Miller actually posts notices on either set of the official bulletin boards (1:43–45, 97). Miller approves postings for the official boards of items such as thank you notes from employees. Such authorized postings may not be ''controversial, political, or religious.'' (RX 3.)

Miller's plant rules (RX 2) include plant rule 30 which reads:

> Posting of notices or any associated and similar communications activities shall not be permitted without the advance approval of the Human Resources Manager.

As early as November 1980 Miller posted a memo to all employees reminding them of rule 30 and advising them that unauthorized postings throughout the plant would be removed and discarded (RX 3–4). Notwithstanding the November 1980 memo, over the years a practice has developed in which employees post items such as personal thank you notes, baby photos, and fishing tournament notices on doors, walls, and other ''miscellaneous areas.'' When Miller's officials become aware of these items, Miller, or its commercial janitorial service, Sunstates Maintenance Corporation, removes the items.

Gladden testified that no employee has ever been disciplined for this posting in violation of rule 30 (2:187). Indeed, Miller makes no effort to determine who has posted these items. This is true even as to signed thank you notes because, Gladden testified, the employee could deny having posted it (2:257, 260). Other than (as we shall see) for Edward Howell in this case, no one has ever notified Miller in advance that he or she intended, in violation of rule 30, to post something on a door, wall, or other miscellaneous area (2:189, 259, 318–319).

Although Miller's policy and general practice have been to remove the items on learning of their presence, there have been a couple of exceptions in practice. Through her misunderstanding of Company's policy, Rebecca Garrison, the labor relations clerk whose duties the last 3 to 4 years have included removal, on discovery, of such items (2:328–329), failed to remove personal items such as thank you notes. She also failed to remove scores of the Miller-sponsored bowling league. Garrison thought these postings were permitted (2:331–332). Gladden, Garrison testified, corrected her misunderstanding about December 1991 or January 1992 (2:333, 341).

The other exception has been made by Don Lee Foye, one of Sunstates' 17 janitors at Eden. Foye elected not to remove personal items such as family death notices if it concerned an employee who was one of his friends. Foye has per-

formed janitorial duties at the plant for 13 years, and he apparently has many friends among Miller's employees. Foye testified that he would allow postings by his friends to remain for a day or so before he removed them (2:364, 366). Foye's superior, Manager John Stegall, testified that he has found Foye, against instructions, leaving personal cards of his friends posted for 2 or 3 days. Foye is a good employee, Stegall testified, but he has friends among Miller's employees and has to be reminded of his duty (2:380–381).

Labor Relations Representative Steven Cates has checked the breakrooms since about March 1991, and removes any postings, but before the events in this case he made his inspections only about every week to 10 days (2:323–326).

B. *The March 1992 Incidents*

1. Facts

Complaint paragraph 7 alleges that about March 20, 1992, Respondent, through Labor Relations Representative Jim McInerney, violated Section 8(a)(1) of the Act by prohibiting and preventing ''the posting of union related material by removing all materials from locations in the plant that had previously served as posting areas,'' and, about March 26, 1992, by prohibiting an employee ''from posting union related material at locations in the plant that had previously served as posting areas.''

Although Miller denies the violation alleged, the material facts are largely undisputed. About March 17 (1:24) or 18 (2:293) McInerney called Edward Keith Howell into his office. (1:24; 2:293; RX 13–1.) In the presence of a union steward and Steven Cates, another labor relations representative, McInerney told Howell that in the course of the Company's investigation of another matter, it was reported that Howell had been soliciting in a manner violating plant rule 25. Reassuring Howell that he was not being accused, McInerney said he simply wanted to make sure Howell was aware of rule 25. Toward the end of the brief discussion, Howell said he was an activist for TDU and would be posting items on behalf of the TDU. McInerney, only a month or so into his position, made no comment.

Howell testified that on March 18 he posted a TDU item (no copy in evidence) on a breakroom door. He observed other items posted, including sympathy cards, thank you notes, sale items, and baby photos (1:26–27). The next day, March 19, he discovered that his TDU posting had been removed, yet the other employee items were left posted. At noon Howell posted another copy of the TDU item. The following day, March 20, Howell observed that all the employee postings had been removed and the doors cleaned. So far as Howell knows, no member of management observed him posting his TDU items (1:37–38, 92). There is no evidence showing who removed Howell's TDU notice on March 18.

At some point in March 1992 (the date is not specified) McInerney called John Stegall to verify that employee postings in miscellaneous areas were being removed. Stegall assured McInerney that they were (2:300, 386–391). I find that this conversation occurred on March 18 or 19, after McInerney's March 18 conference with Howell, and that on March 19 Stegall made sure the miscellaneous areas were clean and free from postings of notes and the like. Cleaning the area and removing postings is a contractual matter for Sunstates. Indeed, the firm is to do so daily. While it may fall short in this respect, its written records reflect that breakroom doors were cleaned of debris, such as notices, and scrubbed on February 24, 1992 (RX 19a; 2:372, 384–385). The February 24 event apparently was a major cleaning as distinguished from the standard cleaning which, Stegall testified (2:376–377), is done for the doors each day.

Following his March 18 conference with Howell, McInerney conferred with his superior, Labor Relations Manager Hollis B. Gaynor Jr., about Howell's in-your-face announcement of intended postings. Thereafter, on March 26 (RX 13–2), McInerney called Howell back and cautioned him about the need to comply with rule 30 respecting postings, or face possible discipline. Howell said there had been many violations of the rule. McInerney assured Howell that everyone must follow the rule and that the cleaning service had been reminded to remove all postings in miscellaneous areas.

Since March 20 Howell, according to his testimony (1:41), has honored rule 30 and made no postings. On several occasions since March 26 Howell has called McInerney to report employee postings of egg sales, sympathy cards, and the like (1:42–43), and McInerney promptly has notified the cleaning service manager, John Stegall, to remove them (2:300–301). McInerney credibly testified that unauthorized postings are removed as soon as his department learns of them (2:317–318).

2. Discussion

There is no evidence that a responsible official of Miller, after being alerted about specific postings unauthorized under plant rule 30, has allowed them to remain posted. Deviations from official policy by one clerk and one commercial service janitor were unknown to Miller's management.

There is no evidence that Miller, through Jim McInerney or any other management person, has singled out TDU postings for removal from miscellaneous areas yet, after notice, has permitted other unauthorized postings in miscellaneous areas to remain.

On March 18 or 19, 1992, I have found, Miller, through Labor Relations Representative Jim McInerney, telephoned Sunstates Maintenance Corporation to verify that Miller's cleaning service contractor was removing all postings in miscellaneous areas. Such an inquiry was not a change of Miller's policy or practice. Contrary to the complaint's allegation, Miller has not knowingly permitted employees to post personal items in miscellaneous areas of the Eden brewery. The evidence shows that Miller, on learning of such postings, has removed them.

After management cautioned Edward Keith Howell on March 26, Miller renewed its efforts—sometimes in response to calls from Howell—to see that any postings in miscellaneous areas are removed. To the extent that renewal reflected an increase in enforcement of plant rule 30, the enforcement was not a significant change in past practice, and no change in policy, and in any event was not a disparate enforcement. Moreover, any increased enforcement was not because of animus against TDU.

Had Edward Keith Howell merely posted his TDU item in a miscellaneous area without giving Miller an in-your-face notice of intention to post, Miller would have done nothing more than it does respecting thank you notes and other post-

ings—it would have removed it on learning of its presence or notify its cleaning service contractor to do so. Indeed, Miller and Sunstates did just that on March 19 when Sunstates removed Howell's TDU item along with all other postings.

The evidence fails to show a violation of 29 U.S.C. § 158(a)(1) as alleged. Accordingly, I shall dismiss the complaint.

CONCLUSIONS OF LAW

1. Miller Brewing Company is an employer within the meaning of 29 U.S.C. § 152(2), (6), and (7).

2. Respondent Miller has not, as alleged, violated 29 U.S.C. § 158(a)(1) respecting its March 1992 enforcement of plant rule 30 by removing employee postings in miscellaneous areas of its Eden, North Carolina brewery.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The complaint is dismissed.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.